In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1389

LLOYD K. FINFROCK AND MISCELLANEOUS FIREARMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to support an order of forfeiture and that whenever the government dismisses an indictment under the Gun Control Act for unlawful dealing in firearms it is collaterally estopped from bringing a civil forfeiture action against any of the firearms involved.

After a forfeiture proceeding in the United States District Court for the Southern District of Illinois, petitioner was ordered to forfeit 19 firearms pursuant to Section 924(d) of the Gun Control Act of 1968, 18 U.S.C. 924(d) (Pet. App. A).[1] The court of appeals affirmed (Pet. App. C).

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[1]Section 924(d) provides in pertinent part:

> Any firearm * * * involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder * * * shall be subject to seizure and forfeiture * * *.

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On July 24, 1971, agents of the Bureau of Alcohol, Tobacco and Firearms (ATF), acting pursuant to a search warrant, seized 23 firearms from petitioner's residence and car. An indictment was returned on August 14, 1971, charging petitioner with various weapons violations, including dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1). On June 17, 1974, the United States Attorney obtained leave of court under Rule 48(a), Fed. R. Crim. P.,[2] and dismissed the indictment. The forfeiture action was commenced on July 9, 1974.

The government's evidence adduced at the forfeiture hearing showed that on December 22, 1970, AFT Agent Borcia, acting in an undercover role, and an informant, Ron Backer, met with petitioner at a restaurant in Lincoln, Illinois (Tr. 8, 48). The men went outside to examine a weapon petitioner had agreed to sell to Backer, but petitioner "said he didn't want do any dealing in the parking lot of [the] restaurant because the State Police hang out there a lot" (Tr. 9). At a shopping center close by, petitioner sold Backer a 1971 model luger pistol for $375 (Tr. 10, 27). Petitioner also displayed and offered several other guns for sale and showed a loaded luger which he had hidden under the front seat of his car (Tr. 9-10, 22).

During the afternoon of February 19, 1971, Agent Borcia and informant Backer again met with petitioner, in petitioner's apartment, where they discussed the possible sale of several firearms (Tr. 11, 30-31). Agent Borcia told petitioner that he was not interested in

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[2]Rule 48(a) provides, in pertinent part, that "the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate."

spending as much money as petitioner was asking for the firearms under discussion, and petitioner replied that, although he did not have such a weapon at that time, he could obtain a Walther PPK which he would sell to Borcia for one hundred dollars (Tr. 11). Petitioner also told Borcia that he had recently bought and sold ten guns for profit (Tr. 11-12).

On July 20, 1971, at another meeting in petitioner's apartment, attended by ATF Agent Krug, petitioner, Backer, and a friend of petitioner's (Tr. 36-37), petitioner again showed and offered various guns for sale at various prices (Tr. 37-38). In particular, he offered to sell Agent Krug a Walther PPK for $130 and a Browning 9 millimeter pistol for $115. No purchases were made, but Agent Krug told petitioner that he would return on the following Saturday to buy one of the guns (Tr. 39). In fact on that Saturday 23 weapons petitioner kept in his apartment and automobile were seized.

Petitioner testified that he was a gun collector, not a dealer, and that he kept his guns hidden in various parts of his apartment because he feared that they might be stolen (Tr. 90-132).[3] In closing argument petitioner's counsel suggested that the discussion of prices in connection with various weapons displayed by petitioner to the agents amounted to no more than petitioner's boastfulness about the value of his collection (Tr. 145).

1. The district court's determination that petitioner was an unlicensed "dealer in firearms" under 18 U.S.C. 922 (a)(1)[4] was clearly supported by a preponderance of the

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[3]As the court of appeals noted (Pet. App. C3), petitioner "did not explain why he kept so many guns in his automobile where they would be particularly vulnerable to theft."

[4]That provision declares it to be unlawful "for any person, except a licensed * * * dealer, to engage in the business of * * * dealing in firearms."

evidence. As the court of appeals observed (Pet. App. C2-C3):

> The record includes an exemplified certification that [petitioner] is not a licensed firearms dealer. He does not dispute this fact but contends that he is merely a gun collector and not a dealer. Two special agents of the Bureau of Alcohol, Tobacco and Firearms testified that (1) [petitioner] sold one gun and offered to sell four others on December 22, 1970; (2) [petitioner] offered to sell four guns on February 19, 1971, during which time he said "he obtained ten .25 caliber pistols from a dealer in Decatur, Illinois, and he said he was able to sell those for a pretty good buck"; and (3) [petitioner] offered to sell five guns on July 20, 1971. This is sufficient evidence to establish [petitioner] as a dealer rather than a mere collector. *United States* v. *Gross*, 451 F.2d 1355, 1357-1358 (7th Cir. 1971); *United States* v. *Zeidman*, 444 F.2d 1051, 1054-1055 (7th Cir. 1971).

The cases contruing Section 922(a)(1) refute petitioner's argument (Pet. 12-13) that to establish that he was a "dealer" the government must prove that he made several sales and profited from them. For example, *United States* v. *Gross*, 451 F.2d 1355 (C.A. 9), rejected the claim that dealing in firearms must be one's primary business, and did not hold that proof that the defendant actually made money from the sale of firearms was necessary to a conviction; *United States* v. *Wilkening*, 485 F.2d 234, 235 (C.A. 8), held that the government need not show that the defendant profited from his dealing; and *United States* v. *Powell*, 513 F.2d 1249, 1250 (C.A. 8), upheld a conviction under Section 922(a)(1) notwithstanding the absence of actual profit, ruling that the evidence was sufficient to support a reason-

able inference that the defendant did or sought to make a profit. Accord, *United States* v. *Swinton*, 521 F.2d 1255 (C.A. 10), certiorari denied, February 23, 1976 (No. 75-5717). Even if the single sale testified to by the agents might not have been enough, standing alone, to establish a violation of Section 922(a)(1), that transaction, plus the other evidence of petitioner's past (profitable) sales and willingness to engage in future sales, was sufficient to show that petitioner was "engaged in the business of * * * dealing." See, *e.g.*, *Kaneshiro* v. *United States*, 445 F.2d 1266, 1269 (C.A. 9); *Bush* v. *United States*, 218 F.2d 223, 224 (C.A. 10).

2. Petitioner having been found to have been dealing in firearms without a license, the firearms "involved in or used or intended to be used" in such unlawful activity were accordingly subject to forfeiture under Section 924(d). Petitioner argues that the forfeiture order must be reversed because the undercover agents did not record the serial numbers of the firearms they observed petitioner display in his apartment and his automobile and were therefore unable to say that those firearms were identical to the firearms seized and forfeited. The agents testified, however, that among the weapons petitioner offered to sell were a Walther PPK pistol, a Browning 9 millimeter pistol, and another pistol in a leather holster (Tr. 38, 51-52); such weapons were included among those seized and forfeited (Tr. 38-39). The agents also testified that a group of the seized firearms were contained in a briefcase that looked like the briefcase from which petitioner displayed firearms for sale, and that some of the seized weapons were wrapped in socks, just as weapons offered for sale by petitioner had been (Tr. 40). This testimony, none of it challenged by petitioner, and the reasonable inferences to be drawn from it, justified the district court in concluding that the government had

proved by a preponderance of the evidence that the seized firearms were firearms "involved in or used or intended to be used" in petitioner's unlawful dealing.[5]

3. Petitioner's last argument is that the government's dismissal of the indictment charging violation of the Gun Control Act collaterally estops the government from bringing a forfeiture action arising out of the same circumstances.

Principles of collateral estoppel preclude repetitive litigation of issues already finally adjudicated; they have no application in the case of a voluntary, court-authorized dismissal by the government, which terminates the action prior to any adjudication and (as petitioner himself acknowledges, Pet. 14) permits recommencement of the very same action subject only to compliance with the relevant statute of limitations.

We agree with petitioner (Pet. 13) that a forfeiture under the Gun Control Act cannot occur absent proof of a violation of that statute. It does not follow, however, that such proof cannot be established except in a criminal case against petitioner himself. Here the district court expressly determined (Pet. App. A2-A3) that on the facts shown petitioner "was engaged in the business of dealing in firearms without the required license" and was therefore "not in compliance with" the Gun Control Act.

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[5] *Lowther* v. *United States*, 480 F.2d 1031 (C.A. 10), contrary to petitioner's claim (Pet. 9), is not in conflict. There the government destroyed firearms that, in light of their owner's acquittal on a criminal charge of unlawful possession, were determined to have been innocently possessed and were not contraband. The government's taking was thus unconnected to any violation of law and the owner was held entitled to a remedy under the Tucker Act. The instant case is different because the district court in the forfeiture proceeding found that petitioner had indeed been engaged in precisely that unlawful activity which warrants forfeiture of the firearms involved.

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To be sure, this determination was made pursuant to the less rigorous burden of proof imposed upon the government in civil as compared to criminal cases, but this Court has not only approvingly recognized this difference but also, in the context of a forfeiture case following an *acquittal* of the libellee on the underlying substantive offense, ruled that the different standards of proof "precludes application of the doctrine of collateral estoppel." *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235. If "acquittal on the criminal charge [would] not necessarily resolve the issues in the forfeiture action" (*id.* at 234), then surely a voluntary dismissal of the criminal charge would not.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.

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